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No. 89-1023

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

MAYLEE DUBOIS and VITOUSEK & DICK REALTORS, INC., Petitioners

v.

GERALD HOCKING, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

First and foremost, it is important to highlight that Respondent Gerald Hocking *("Hocking")*, in his Brief in Opposition (the *"Opposition"*), has not challenged or denied several of the important and substantial reasons favoring the grant of a writ of certiorari in this case as explained by Petitioners in their Petition for a Writ of Certiorari (the *"Petition"*). Rather, Hocking has attempted to misfocus this Court's attention and obfuscate matters by very seriously misstating the undisputed facts and then analyzing the misstated facts, instead of addressing whether proper and substantial reasons exist in this case for granting a writ of certiorari.

Petitioners have set forth six substantial reasons in their Petition for granting a writ of certiorari in this case, including: (a) the deep division between the majority and two dissenting opinions in the Ninth Circuit's *en banc* panel decision, and the creation of a new test by the majority for determining whether a security exists, despite the absence of precedence therefor; (b) the majority's very serious misinterpretation of, and hence creation of conflict with, the Fifth Circuit's decision in *Blackwell v. Bentsen*, 203 F.2d 690 (5th Cir.), *cert.*

dismissed, 347 U.S. 925 (1953); (c) the significant conflict between the majority's opinion, on the one hand, and the opinions of several important Federal appellate and two district court decisions, on the other hand; and, (d) a total conflict between the majority's opinion and the views, interpretations and positions of the Securities & Exchange Commission *("SEC")* in this case.

Inasmuch as Hocking's Opposition does not challenge or deny the importance or substantiality of most of the reasons advocated by Petitioners for granting a writ of certiorari, but instead Hocking seriously distorts the simple undisputed facts of this case, Petitioners will briefly address and correct the more serious misstatements in the Opposition (in addition to addressing the two weak and misleading arguments put forth by Hocking as to why certiorari should not be granted):

1. It was Hocking who sought the assistance of Petitioners to find him a condominium in Hawaii, as contrasted with Hocking's false assertion at page 2 of the Opposition that Petitioners sought him out (Record on Appeal *("ROA")* to the Ninth Circuit, pp. 63, 68 and 76). In addition, there is nothing in the record supporting Hocking's false assertion that Petitioner Maylee Dubois *("Ms. Dubois")* proposed that Hocking purchase the condominium "for investment purposes," or that she proposed that he enter into a rental pooling arrangement *("RPA")* with respect to the condominium. On the contrary, the record indicates that Ms. Dubois merely ***informed Hocking of the existence of an RPA.*** (ROA, pp. 69, 70 and 87.) There is no dispute that she had no right or authority to ***offer,*** and that she did not ***offer,*** Hocking any right to participate in an RPA.

Hocking's contention that he was offered a "bundle of goods" consisting of both the condominium and the RPA is contrary to the undisputed facts of this case which show an absence of any connection or relationship whatsoever between the sellers (the Libermans) or Petitioners, on the one hand, and Hotel Corporation of the Pacific, Ltd., the rental pool operator *("HCP"),* on the other hand. As such, neither

the Libermans nor Petitioners had the authority, power or right to offer anything to Hocking insofar as the RPA was concerned—only HCP had such ability. All that happened here was that Petitioners ***advised Hocking of the availability of a rental service operated by an unrelated third party.*** The dissenting opinions in the *en banc* decision emphasized that the Libermans and Petitioners had nothing to offer insofar as the RPA was concerned, and therefore did not offer to Hocking the one and only element—i.e., the RPA—that gives rise to the securities issue in this case.

In addition, Hocking misleadingly attempts to transform the fact that Ms. Dubois ***informed him of the availability*** of a rental service into the false contention that the RPA was "part and parcel of the offer to Hocking to purchase the condominium. . . . " (Opposition at p. 3.) The true and undisputed facts are that the RPA was offered by HCP, which had ***no affiliation or selling arrangement with the sellers of the condominium or Petitioners.*** Two different commodities were offered by two different sets of parties who were not affiliated with one another.

One of the important reasons contended by Petitioners, and the primary reason asserted by the SEC, for the proposition that an ***investment contract*** is not present in this case insofar as the ***offer and sale of the condominium are concerned*** is that there was ***no affiliation or selling arrangement between the sellers*** of the condominium ***or Petitioners*** (sellers' agent), on the one hand, and HCP, on the other hand. It is the absence of such a linkage that is fatal to Hocking's case, and is perhaps the paramount legal issue in this case.

2. Hocking states falsely that the RPA "was connected with the developer" (Opposition at p. 3), and that while it is true he learned he was purchasing the condominium from a secondary purchaser rather than the developer, he "still believed that he was dealing with a RPA company provided by the developer." (Opposition at p. 4.) The record is completely devoid of any basis for these statements.

Moreover, Hocking's argument at page 7 of the Opposition to the effect that the Addendum to the RPA signed on

or about July 21, 1979 (Appendix III to the Opposition) somehow supports his contention that he thought he was purchasing directly from the developer is contradicted by his own statement at page 4 of the Opposition where he admits that he "became aware that he was instead a secondary purchaser and was purchasing the condominium from an original purchaser." This gross contradiction by Hocking is but an example of the extent to which he has gone in misstating the facts and attempting to obfuscate matters in this case.

In addition, contrary to Hocking's false assertion, there is no evidence whatsoever in the record to suggest any involvement by the developer in connection with Hocking's purchase of the condominium. In this regard, Hocking's own deposition testimony contained in the Record on Appeal to the Ninth Circuit contradicts this assertion:

> "Q. Did anyone from Aetna Life Insurance [the original developer of the condominium complex] or whoever you found to be the true owners that were building the place approach you and promote you, promote the sale of the condominium to you?
>
> "A. No." (ROA, p. 82.)
>
> * * *
>
> "Q. Do you have any reason to believe that Maylee [Dubois] or Vitousek & Dick Realtors were connected in any way with the builders and promoters of the condominium complex?
>
> "A. No." (ROA, p. 83.)

Hocking's further contention that the Addendum somehow confirmed a linkage ***between HCP and the developer*** is misleading and misses the score on several points. First, the paramount issue in this case is whether there was an affiliation or selling arrangement ***between the sellers of the condominium or Petitioners, on the one hand, and HCP, on the other hand—***

and on this score, the record is clear that there was nothing of the kind. (Contrary to Hocking's misleading argument, the issue in this case is ***not*** whether there was such a relationship ***between HCP and Aetna, the developer.)*** Second, it was not until ***after*** the parties filed their petitions for rehearing *en banc* with the Ninth Circuit that the Addendum to the RPA surfaced in this case for the very first time. Prior to that time, Hocking had not even produced or referred to it, and had acknowledged that the developer played no role in these transactions (although Hocking now argues in his Opposition that the Addendum led him to believe there was a linkage between HCP and the developer). Indeed, while Hocking attached a copy of the rental pooling agreement to his complaint in this case, he did not include the Addendum therewith.

Moreover, the Addendum indicates that the original agreement pursuant to which the developer sold the condominium (which sale by the developer predated, and was unrelated to and independent of, the resale of the condominium by the Libermans to Hocking) required that the Libermans waive all aspects of any future agreement to pool or share expenses with any other units in the condominium complex until the developer had closed the sale of all of the units in the complex or until December 31, 1982, whichever occurred first. The obvious intent of such a clause was an attempt to separate the developer from any future rental pool whatsoever relating to the property, not to bring the developer closer to it. Hocking contorts this simple fact into a contention that it evidenced a linkage between the developer and HCP (which contention, as explained above, is irrelevant in any event since the real issue in this case is whether ***a linkage existed between the sellers or Petitioners, on the one hand, and HCP, on the other).***

3. Hocking's contention at page 8 of his Opposition that there is no need to distinguish between a condominium offered with an RPA when it is offered by the original developer rather than by a subsequent owner or by a broker is both misleading and not relevant to this case. It is misleading because it implies that the RPA in this case

was offered by the "subsequent owner"—the Libermans—or Petitioners as brokers, when the undisputed facts reveal that: (a) the Libermans were not participants in the RPA, had no arrangements or dealings with HCP, and had no communication or contact with Hocking; and (b) Petitioners had no affiliation or selling arrangement with HCP. Hocking's contention is irrelevant because the issue which the argument attempts to deal with is whether there was a ***linkage between the sellers or Petitioners, on the one hand, and HCP, on the other hand;*** however, the undisputed facts show that there was no such linkage in this case.

Moreover, Hocking's argument that it makes no good sense to differentiate between the situation where the offerors and the sellers of the condominium and the RPA are different and separate entities rather than the same one flies in the face of the very essence and basis of the sharp differences in the three opinions comprising the Ninth Circuit's *en banc* decision as well as the strong views and opinions urged by the SEC in its *amicus* brief to the Ninth Circuit.

4. Hocking states at page 3 of his Opposition that he expected the rental income from his condominium to reach certain levels "[b]ased on the representations of Dubois concerning income to be derived from the RPA. . . ." In fact, however, Hocking swears in his own affidavit attached as Appendix I to the Opposition (¶ 4, at page I-2) "that defendant Maylee Dubois did not make any representations as to how much rent [Hocking] would expect to receive on a monthly basis. Again, it is accurate that she did not state a specific figure to me."

5. At page 6 of his Opposition, Hocking attempts to make light of the termination rights he had under the so-called "Pooling Agreement" (a copy of which is attached as Appendix II to the Opposition). However, Paragraph 2 of the Pooling Agreement stated in no uncertain terms that:

> "Either party may elect to terminate this Agreement by giving written notice to the other party ninety (90) days prior to an anniversary date of this Agreement except that during the initial year Owner

> may elect to terminate at any time by giving written notice to Agent fifteen (15) days prior to date of intended termination. For purposes of this Agreement an 'anniversary date' shall be deemed to be January 1st."

As explained in the Petition, this termination right is of major significance in this case because it gave Hocking the ability to take back control and use of his condominium on short notice, and hence negated the third prong of the investment contract test set out in *SEC v. W.J. Howey*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946).

6. It is apparent that Hocking does not fully understand the potential consequences of this case to the real estate industry. If the consequence of this case is that real estate transactions will be more easily transformed into securities transactions, the impact on the real estate industry will be dramatic, manyfold and in some cases devastating. Most significantly, persons desiring to sell real estate will not be allowed to advertise it in newspapers and the like (which is the conventional means of advertising real estate for sale) without first filing a registration statement with the SEC for such a public offering of securities. The registration process is extremely expensive and time-consuming, and in the great majority of cases will cost far more in money and time than is practical or sensible.

Secondly, real estate agents will have to be registered as securities brokers in order to participate in sales of such properties. This concern was addressed by the National Association of Realtors and the Hawaii Association of Realtors in their *amicus curiae* briefs filed in connection with the Ninth Circuit's *en banc* consideration of this case. In the words of Judge Norris, writing for the five dissenting members of the *en banc* panel:

> "The majority's test is so standardless that unwary realtors who do nothing more than advise prospective condominium purchasers about the availability and economics of an RPA will find themselves in federal court defending actions

brought under the federal securities laws on the authority of the decision in this case." *Hocking v. Dubois,* 885 F.2d 1449, 1465 n.11 (9th Cir. 1989) *(en banc).*

Petitioners respectfully submit that there are many valid and substantial reasons justifying the grant of a writ of certiorari in this case.

Respectfully submitted,

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